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ALEXANDER L. STEVAS,

No. 83-1027

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

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On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

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## BRIEF IN OPPOSITION OF RESPONDENT WARREN COUNTY COMMISSIONERS

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## QUESTIONS PRESENTED

A. Whether the United States Supreme Court has jurisdiction to consider a case in which the only federal question was raised for the first time on petition for certiorari to the Court?

B. Whether the Fourteenth Amendment to the United States Constitution requires a state supreme court to *sua sponte* extend application to the state comparative negligence statute retroactively to include a case pending before the state supreme court?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented . . | I |
| Statement of the Case . . . . . | 1 |
| The Petition for Writ of Certiorari Should Be Denied | 3 |
| A. The issue presented by the petitioner was not properly raised in the state courts below | 3 |
| B. The Ohio Supreme Court's dismissal of petitioner's appeal did not deprive petitioner of his right to equal protection and due process | 4 |
| Conclusion . . . . . | 5 |

# TABLE OF AUTHORITIES

**Cases:** Page

*Bailey* v. *Anderson*, 326 U.S. 203, 205-207 (1945) . 3

*Cardinale* v. *State of Louisiana*, 394 U.S. 437, 438 (1969) . . . . . 3

*Crowell* v. *Randell*, 35 U.S. 368 (1836) . . . . . 3

*Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983) . . 2, 4

**Statutes and Other Authorities:**

Ohio Revised Code 2315.19 . . . . . 2

28 U.S.C. 1357 (3) . . . . . 3

United States Constitution
Fourteenth Amendment . . . . . 3, 4

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## STATEMENT OF THE CASE

On July 23, 1979, petitioner was involved in a collision at the intersection of Columbia and Fields-Ertel Roads in the vicinity of Cincinnati, Ohio. Petitioner failed to stop at an existing, present stop sign and collided with a vehicle operated by Robert P. Cornett (not a party to the suit). Petitioner filed an action against respondents claiming they had allowed foliage to interfere with the clear view of the stop sign which created a nuisance, making

respondents liable for damages sustained by the petitioner in said accident. Respondents answered raising contributory negligence and sovereign immunity as a defense.

Each respondent filed a motion for summary judgment asserting, *inter alia*, that petitioner was contributorily negligent as a matter of law. Petitioner denied any such negligence, but *did not* urge the court to apply Ohio's comparative negligence statute to the case. The trial court granted respondent's motion for summary judgment.

The case was appealed to the Court of Appeals for the First Appellate District of Ohio and to the Supreme Court of Ohio. The appeals were grounded on the same issues and arguments that were presented to the trial court. In none of these proceedings did petitioner assert the retroactive applicability of the comparative negligence statute. The intermediate appellate court affirmed the trial court's decision, and the Supreme Court of Ohio declined to exercise jurisdiction.

While the case was pending in the Supreme Court of Ohio, that court issued its opinion in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), which held that Ohio's comparative negligence statute, O.R.C. 2315.19, should be applied retroactively to negligence actions tried after June 20, 1980.

## THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

### A. The issue presented by the petitioner was not properly raised in the state courts below.

In his petition for certiorari, petitioner apparently contends his rights to due process and equal protection, as guaranteed by the Fourteenth Amendment, were abridged by the Ohio Supreme Court's failure to apply the Ohio comparative negligence statute to the instant case.

It was very early established that the United States Supreme Court does not have jurisdiction to review a state court decision where federal or constitutional questions are raised for the first time on petition for writ of certiorari to the Court. *Crowell* v. *Randell*, 35 U.S. 368 (1836); *Cardinale* v. *State of Louisiana*, 394 U.S. 437, 438 (1969).

Similarly, an argument initially presented to state courts in terms of state law cannot be converted to a constitutional argument in order to sustain jurisdiction in this Court. *Bailey* v. *Anderson*, 326 U.S. 203, 205-207 (1945).

In the instant case, in both the state court of appeals and the state supreme court, the petitioner urged an interpretation of state law which would allow it to proceed against the respondent upon a theory of negligence. The petitioner did not present the constitutional issue now before the Court to the state supreme court either before it declined jurisdiction or by way of a motion for rehearing. Petitioner's failure to raise the federal questions presented to this Court and the courts below is fatal to its assertion of jurisdiction pursuant to 28 U.S.C. 1357 (3).

**B. The Ohio Supreme Court's dismissal of petitioner's appeal did not deprive petitioner of his right to equal protection and due process.**

Petitioner apparently argues the state supreme court abridged his right to due process and equal protection when it did not extend the rule of decision announced in *Wilfong* v. *Batdorf*, 6 Ohio St. 3d 100 (1983), to this case, which was pending on petition for writ of certiorari when *Wilfong* was decided. Clearly, however, whether the *Wilfong* case required an extension of the Ohio comparative negligence statute to those cases pending for certification in the Ohio Supreme Court is a question of state law properly raised in the state courts. Moreover, petitioner has failed to indicate how his Fourteenth Amendmennt rights were abridged by the failure of the Ohio Supreme Court to *sua sponte* extend the *Wilfong* decision where the petitioner failed to argue for an application of comparative negligence in any of the state court proceedings. The petition, through a creative wording of the questions presented, seeks to invoke the jurisdiction of this Court in a case which presents no substantial federal questions. The respondents respectfully request, therefore, that the Court deny the request for a writ of certiorari.

## CONCLUSION

Respondents respectfully submit that the question presented by the petitioner was not raised, argued, or decided in the courts below. Moreover, the record does not support the issue raised by petitioner for the first time in its petition for a writ of certiorari before this Court. For these reasons the petition should be denied.

Respectfully submitted,

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